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No. 95-1257

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

SUSAN L. FALLINI, and JOSEPH B. FALLINI, JR. in each of the following capacities: as an individual person and successor to the interest of HELEN FALLINI as sole heir of HELEN FALLINI, deceased; as executor of the Last Will of HELEN FALLINI; as Trustee of the HELEN FALLINI Living Trust; and the HELEN FALLINI Living Trust as the sole distributor of the Last Will of HELEN FALLINI,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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REPLY TO STATEMENT[1]

Grazing use of the public lands was the subject of a sea change in the Taylor Grazing Act of 1934[2], and the Act did not merely continue the concept of government ownership, as the STATEMENT of the Government implies. It awarded a preference in the use to those private lands and waters which had become dependent upon the public land for grazing in the government encouraged settlement of the West. Although the grazing preference does not create any "right, title, interest, or estate in or to the [public] lands"[3], so long as the preference exists it is protected against cancellation or reduction except within the limits of the Secretary's regulations.

The grazing preference holder may also construct improvements upon the public land "necessary to the management of the permitted livestock"[4], but even before this Act the petitioners and their family predecessors in interest had constructed, maintained, and operated at

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[1] pp 2-8 of *Brief for the United States in Opposition*, hereinafter cited as "US ___".

[2] ch. 865, 48 Stat. 1269, 43 U.S.C. 315 *et seq.*

[3] 43 U.S.C. 315b. The associated regulation of the Secretary, 43 CFR 4120.3-1(e), purports to expand upon the Act to the extent that it provides, according to the STATEMENT of the government at 3, that a grazing permit does not convey any right, title, or interest in any lands "or resources" held by the United States. The extension is clearly wrong as to the forage resource which is obviously conveyed in the use of the preference for which payment is made.

[4] Id., §4, 43 U.S.C. 315c.

their substantial expense a large number of improvements which brought water to the surface of this desert environment, captured and confined the produced water, and distributed it for the sustenance of their livestock. The appropriation of the water did not (and does not) occur by federal authority; the controlling authority is the State of Nevada, the right to appropriate the water was acquired by petitioners and their predecessors from the State, and it is State law that recognizes private property in the appropriated water which has been reduced to possession by artificial means.[5]

Although the public lands are to be managed for multiple uses[6], not all of the public land or its assets need to (or can) simultaneously serve all of the multiple uses.[7] That management or range improvements must be "consistent" with the principle of multiple use does not require that one user be obligated to sustain the cost of other multiple uses, or even that every management tool or improvement must accommodate all of the multiple uses. A public land recreational user is no more obligated to pay the fee for grazing livestock than a grazing preference holder is obligated to provide sustenance to wild and free roaming horses and burros. Thus, a range

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[5] *Robbins v. City of Rapid City*, 23 N.W.2d 144, 148 (SD 1946); *Hagerman Irrigation Co. v. McMurray*, 113 P. 823 (N.M. 1911); *Stevens v. Oakdale Irr. Dist.*, 90 P.2d 58, 61 (Cal. 1939); see, also, *Spring Valley Water Works v. Schottler*, 28 L.Ed. 173, 182-184 (1884) (Fields, J. dissenting); *Gunnison Irr. Co. v. Gunnison Highland Canal Co.*, 174 P. 852, 855 (Ut. 1918).

[6] Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 43 U.S.C. 1701(a)(7).

[7] Id., 43 U.S.C. 1702(c).

improvement may not offend another multiple use, but it need not accommodate all of the multiple uses.

As the STATEMENT of the Government expresses, the Secretary has also authorized range improvements for many other purposes, including "providing habitat for wild horses and burros"[8], but this does not imply the petitioners' range improvements which were permitted for the watering of their livestock must also be dedicated at their expense to the sustenance of the wild horses and burros or every other use which the Government may choose to authorize upon the public lands.

From the time of the enactment of the Wild Free-Roaming Horses and burros Act in 1971[9] the petitioners were prohibited from protecting their water from the use of these animals because doing so would require activities which would constitute harassment of them. However, petitioners had no reason to believe that the Secretary would never satisfy the needs of the horses he was obligated to manage, but he never has. Therefore, as the petitioners opened their water supplies to the use of their livestock, the more aggressive wild horses consumed the water instead, and petitioners were required to produce water for their livestock and accomplish the permitted and required purpose of their grazing permit and range improvement permits.

The population of wild horses escalated and exhausted the forage and water resources within the area in which they were found at the time of the Act, and the

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[8] 43 CFR 4100.0-5.

[9] 85 Stat. 649, 16 U.S.C. 1331 *et seq.*

horses expanded from that area, finally into all of the Reveille Allotment. Because this mismanagement by the Secretary caused the prohibited relocation, the federal court on November 28, 1986 defined the area of the Reveille Allotment within which the horses were to be managed and fixed the maximum number of horses which could lawfully occupy the area and the allotment.

One element of the protected status created by the Act is the area of horse residence on December 15, 1971 and the grazing capacity of that area is the upward limit of the protected population of the Reveille Allotment. That is the number which would permit a thriving ecological balance of the public land resources, and this is the protected population. The Secretary had the obligation to establish that number, but he did not do so until December 1, 1986, after being compelled to do so by the federal court on November 28, 1986.[10] Until then, the protected population was unknowable and because it was

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[10] *Fallini v. Hodel*, No. R 85-535 BRT, Findings of Fact, Conclusions of Law and Judgment (D.Nev.Nov. 28, 1986), Joint Appendix for the Federal Circuit, at 1059, *et seq.* The Judgment, at 1078: "IT IS ORDERED that the Secretary of the Interior, its agents and employees, are enjoined and prohibited from managing wild horse herds in any area of the Reveille Allotment except that which is described in the court's findings of fact. IT IS ORDERED that within thirty (30) days from October 31, 1986, the State Director of the Bureau of Land Management will determine an optimum number of wild horses to be managed within the historical wild horse use area . . . taking into account guidelines established by Congress and this decision. IT IS ORDERED that before March 1, 1987 defendant Secretary of the Interior shall cause all wild horses in excess of the optimum number which he determines, to be removed from the Reveille Allotment." On December 1, 1986 the State Director complied.

unknowable, the taking was undefinable as to either population.[11] Following the order, the Secretary began removing horses and eventually brought the population down from more than 1200 to lawful numbers determined by the court to be between 145 and 165.

As the population enlarged from 126 in 1971 to 2,238 in 1983 the petitioners were pleading with the Secretary to provide water, and were litigating the Act in an effort to require the Secretary to assume his responsibilities, finally sending him a bill on October 3, 1983 for some of the past water cost. Until the court order on November 28, 1986 the Secretary did not recognize his duty to limit the population to the capacity of the area in which the horses were found at the time of the Act, to decide what that capacity was, and thereby determine what the maximum lawful population was to be in that area and in the Reveille Allotment.

Petitioners have not been inconsistent in their claim, as stated at US 7-8. Petitioners claimed separately for taking by the protected population and the unprotected population within and beyond the six years from their complaint. The Government challenged only the takings beyond the six years[12] until its reply brief suggested a

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[11] *Fort Mojave Indian Tribe v. United States*, 23 Cl.Ct. 417, 430.

[12] Answer, Second Defense, "Some of plaintiffs' claims are barred by the six-year statute of limitations."; Joint Preliminary Status Report, p. 5, "Defendant believes that the relevant issues are as follows. . . . 4. Whether any claim of a taking prior to November 24, 1986 is beyond the six-year statute of limitations." Defendants' Motion for Summary Judgment. Supporting Memorandum, p. 36. "Any claimed taking prior to

complete bar. The Court of Federal Claims completely ignored the jurisdictional claim, as did petitioners in their brief on appeal to the Federal Circuit. In its answering brief, the Government claimed that the 1983 Fallini bill showed knowledge of the obligation so as to commence the running of the Statute of Limitations as to all of petitioners' claims. But the jurisdictional defense did not become important until the oral argument before the Federal Circuit and the following petition for rehearing. The Government, not the petitioners, has been inconsistent in its defense to petitioners' claims.

REPLY TO ARGUMENT

1. The Government has mischaracterized petitioners' claim and thus fails to address the essential distinction between eminent domain and inverse condemnation on the one hand and a regulatory taking on the other. Petitioners do not assert that "the statute of limitations never runs on their claim as long as the purported regulatory taking is still ongoing." US 7. Rather, petitioners "argued that at a minimum they should be able to recover for the regulatory takings which occurred during the six years prior to the date on which their claim was filed." Pet. 4. This formulation of petitioners' claim reflects the continuing wrong associated with the ongoing, regulatory taking affected by the Secretary's administration of the Wild and Free-Roaming Horses and

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November 24, 1986 is beyond the six-year Statute of Limitations".

Burros Act, while also recognizing the important purposes of the statute of limitations.

2. In discussing the Tucker Act's six-year statute of limitations, the Government correctly states that Congress "intended that plaintiffs file actions as soon as they become aware of the facts giving rise to a claim . . . " US 9. That is precisely why a regulatory taking claim, like petitioners', cannot be said to have "first accrued" at a single point in time. As the history of the Government's administration of the Wild Free-Roaming Horses and Burros Act on petitioners' grazing allotment evidences, petitioners could not have been "aware of the facts giving rise to a claim" (US 9) when the Act was adopted or when the Secretary first adopted enforcing regulations. The application of the regulations changed dramatically since the Act was adopted with widely varying results for petitioners. The application of those regulations, which are subject to day-to-day enforcement by the Bureau of Land Management, can and probably will change in the future. The facts relevant to the continuing wrong suffered by petitioners became knowable as to their present complaint only after November 28, 1986 and will be knowable as to other complaints only as the Secretary continues to exercise his ongoing regulatory powers.

The Government's insistence that a claim under the Tucker Act "first accrues" for statute of limitations purposes "on the date that the directive first affected their property interest." (US 12) leads to the conclusion that "[i]f petitioners succeeded in persuading the courts that the regulatory measure amounted to a taking, the government would then have to decide whether to exercise its power of eminent domain . . . or to rescind the challenged

regulation." US 9. This conclusion ignores petitioners' central argument which is firmly rooted in the temporary taking doctrine of this Court's decision in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987).

The point of the temporary taking doctrine is that government can, consistent with the Fifth amendment, engage in a regulatory taking without being forced to acquire the affected property through condemnation. To insist, as the Government does, that in the context of a regulatory taking, government faces a choice "to exercise its power of eminent domain through the payment of compensation, or to amend the regulation" (US 10), is to ignore the inevitable conclusion from *First English* that government can satisfy the Fifth Amendment's just compensation requirements without acquiring title to affected properties. If this is true with respect to the historic impacts of existing regulations, it must be equally true with respect to the future impacts of those same regulations. Government does have the option to rescind or amend the offending regulations or adjust its application of them, but failure to do so does not impose on the government the duty to acquire the property. By insisting that government must choose between condemnation and repeal of an offending regulation, the Government ignores the middle ground confirmed by the *First English* temporary takings doctrine. It is middle ground critical to the constitutional regulatory powers of both state and federal governments.

The Government argues that "early presentation of regulatory taking claims ensures that the challenged regulation is reevaluated promptly, and also ensures an opportunity for the government to limit its liability." US 10. Neither of these objectives will suffer if the Court adopts petitioners' position. If petitioners are permitted to recover only for losses incurred during the six years prior to the filing of their complaint, government's opportunities for regulatory reevaluation and limiting liability will be unaffected. But assuming reasonably clear taking doctrine, government has these opportunities on a constant basis. As petitioners have already argued, it would be unacceptable to assume "that the government will not comply with its responsibilities under the Fifth Amendment except when sued by property owners and ordered to compensate by a court." Pet. 17.

In quoting from *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938) on the objective of "putting 'an end to the possibility of litigation after the lapse of a reasonable time' " (US 10), the Government conveniently omits this Court's description of the statute of limitations as a "statute of repose, designed to protect the citizens from stale and vexatious claims. . . . " There is surely nothing stale or vexatious about a property owner's claim under the Fifth Amendment for the current effects of an ongoing regulation.

Finally, the Government insists that petitioners' losses are the continuing ill effects of the enactment of the Wild Free-Roaming Horses and Burrows Act, not a continuing violation. But the facts in this case are easily distinguishable from those in the cases cited by the Government. In *National Advertising Co. v. City of Raleigh*, 947

F.2d 1158, 1167 (4th Cir. 1991), the court of appeals recognized a continuing violation "where regulations continued to be applied to persons within the statutory limitations period." That is certainly the situation where the government has ongoing enforcement responsibilities affecting petitioners' daily production of water pursuant to its water rights under Nevada law.

3. As it has done in every prior proceeding in this case, the Government incorrectly asserts that petitioners' property claim is based upon federal law. ("Petitioners have an interest only in the amount of water that they can put to beneficial use by virtue of their federal grazing preference.") US 12. As this court confirmed in *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 1029 (1992), property rights are defined by state law, in this case the water law of the State of Nevada. Under Nevada law, petitioners have a complete property interest in the water pumped from the federal land, captured in tanks and from those tanks distributed to troughs for the watering of their cattle, but which is instead consumed, a consumption which petitioners are forbidden to prevent.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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